United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1035

TO BE ARGUED BY:

HAL MEYERSON, ESQUIRE

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, :

Appellee, :

vs. : BRIEF FOR APPELLANT

PASQUALE MADDALENA, : Index Number: 77-1035

Defendant-Appellant. :

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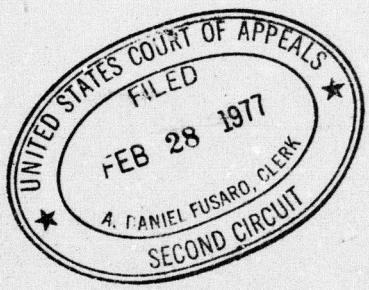
ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE EASTERN DISTRICT

OF NEW YORK



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CASES CITED

QUESTIONS PRESENTED

The defendant-appellant appeals on the basis of the following errors:

1. The trial judge erred by admitting into evidence an alleged prior similar act;

2. Not sufficient time to investigate the incident and prepare a defense;

3. Instructions as to similar acts were too brief and vague to be understood by the jury;

4. Summation of prosecutor was inflammatory and prejudicial.

PRELIMINARY STATEMENT

The defendant-appellant, PASQUALE MADDALENA, was indicted in a five count indictment charging him with violations of 21 U.S.C. Section 622, charging, in substance, that Pasquale Maddalena, while an inspector, officer and employee of the United States Department of Agriculture, Meat and Poultry Inspection Program, authorized to perform the duties required by the Federal Meat Inspection Act of 1967, unlawfully, willfully and knowingly did receive and accept money from persons and entities which he was charged with inspecting. On December 27, 1976, Pasquale Maddalena was convicted after trial before Honorable Jack B. Weinstein of all five counts of the indictment.

On January 7, 1977, Honorable Jack B. Weinstein sentenced the defendant-appellant to eighteen (18) months concurrent on all counts.

STATEMENT OF FACTS

The five counts of the indictment covered various periods of time in 1973 and 1974. They did not cover any period of time in 1972.

On the day of trial, the Assistant United States Attorney informed the defendant and the Court that he wished to introduce testimony of prior similar acts of the defendant in 1971 and 1972. (App. pp. 10a-11a) Defense counsel objected that he was not notified of this offer of proof until the morning of the trial. (App. p. 14a) Indeed, defense counsel stated that in the course of pre-trial discovery, he was told by the prosecutor that there were no acts of wrongdoing by the defendant prior to the dates of the indictment. (App. p. 15a) Although the prosecutor did not admit making such representations (App. p. 15a) he did admit that he did not notify the defendant that he intended to offer evidence of prior similar acts until the morning of the trial (App. p. 14a).

Judge Weinstein ruled that he would allow the prosecutor to introduce evidence of one prior similar act of wrongdoing on the part of the defendant. (App. p. 16a) The first morning of trial was a Thursday. The Trial Judge allowed only until Monday for the defense to prepare for the introduction of the evidence. (App p 14a)

The basis on which the Trial Court allowed the evidence of the proper similar act of misconduct was, as follows:

"In view of the nature of the cross-examination, suggesting that the witnesses are mistaken about the identification of this defendant as the person who took bribes -- not bribes -- or supplement of their income, I think it is appropriate."
(App. p. 16a)

1. THE TRIAL JUDGE ERRED BY ADMITTING INTO EVIDENCE AN ALLEGED PRIOR SIMILAR ACT.

It is respectfully submitted on behalf of the defendant-appellant that there was no issue of identification raised by the defense by cross-examination or otherwise. It was never the position of the defense that the witnesses for the prosecution mis-identified him or that he was not an inspector assigned to the businesses where the various witnesses were located. In fact, defense counsel stipulated that the defendant was employed as a United States Department of Agriculture meat inspector at the establishment listed in each of the five counts of the indictment on the dates or between the dates alleged in each count of the indictment (App. p. 10a).

To make the issue more confusing, when the evidence of the prior similar act was actually offered in the form of the testimony of Joseph Daren, President of the Omaha Hotel Supply Corporation, the Trial Judge did not limit the instruction to the jury to indentity; on the contrary, he stated that said evidence may be used by the jury, if believed, to show that there was a plan or that there was an intent or an opportunity, or that this man was the person identified as the inspector charged specifically. (App. pp. 17a and 18a)

After both sides rested, the Trial Judge charged the jury with respect to the aforesaid matters, as follows:

"There was evidence of one act not charged. This may be used by you as evidence of lack of mistake or plan or intent or opportunity or identity but not as evidence that this person is a bad person and therefore committed the bad act charged. If he didn't commit the bad act charged, he must be acquitted. It doesn't make any difference what he may have done or what somebody else may have done." (App. p. 23a and 24a)

Rule 404(b) of the Federal Rules of Evidence states, as follows:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In the instant case against the defendant-appellant, the offer of proof of similar acts does not fit within any of the aforesaid exceptions and hence is only being offered to prove the character of the defendant, a violation of the defendant's constitutional right of due process.

At trial, it was the defendant-appellant's position that the charges of the indictment were false because the witnesses were lying with respect to their testimony concerning the payment of money to Mr. Maddalena.

As stated previously, the defendant-appellant did not claim that the witnesses were mistaken as to the identity of Mr. Maddalena nor did the defense question that Mr. Maddalena worked as a United States Government Inspector assigned to inspect

the premises listed in each count of the indictment during the periods listed in each count in the indictment.

The defendant did not claim to have taken money but with an innocent purpose. The position of the defense was that Mr. Maddalena never received any money at all. Hence the defendant never focused on any issue which concerned intent.

Indeed, intent was never an issue. Intent was not a part of the crime charged. There was no requirement on the part of the prosecution to prove intent in order to prove 21 U.S.C. Section 622.

It is obvious that motive was not in issue. In this case, evidence of the prior similar act could have no bearing upon a motive for the crimes charged.

The only possible situation which the evidence of prior similar acts could fall within is that of "plan or design."

Cases which admit proof of other crimes as evidencing a plan or design from which it can be inferred that the defendant committed the crime in question fall into three somewhat overlapping situations, see Weinstein's Evidence, United States Rules §404 (09) as follows:

(1) Same or common or connected or inseparable plan or scheme or transaction, or res gestae.

In this situation, evidence of other crimes is admitted where the other crimes is so integrally related to the crime charged in both time and place as to be "inseparably connected" and where evidence of the other crimes serves to establish the

crime which is charged." See, e.g., Morgan v. United States, 335 F.2d 43, 45 (Tenth Cir.,) cert. den., 384 U.S. 1025 (1966); Evenson v. United States, 316 F.2d 94, 96 (Eighth Cir., 1963). Here the crimes are linked as "part of the context of the crime" charged, United States v. Smith, 446 F.2d 200 (Fourth Cir., 1971) or as "part of the overall occurrence" Buatte v. United States, 350 F. 2d 389, 395 (Ninth Cir., 1965), cert. den., 385 U.S. 856 (1966).

Evidence of this sort is usually included so as to give a complete picture of the defendant's conduct at the time and place of the crime charged. McCormick states that evidence is introduced for this purpose, "[t]o complete the story of the crime on trial by proving its immediate context of happening near in time and place." McCormick Evidence §157 (1954).

Where it appears that the other crime is so remote as not to be connected with the crime charged, evidence thereof is excluded. Anderson v. United States, 170 U.S. 481, Torcia, Wharton's Criminal Evidence §242.

The instant facts do not fall within this exception because the evidence of similar acts are alleged to have occurred one year prior to the crime charged.

(2) Continuing place, scheme or conspiracy.

McCormick states that this exception is "to prove the existence of a larger continuing plan, scheme or conspiracy, of which the present crime on trial is a part." McCormick Evidence §157.

An example of this exception is United States v. Light, 394 F.2d 908, 912-913 (Second Cir., 1968). Light concerned a conspiracy to violate the Securities Act and mail and wire fraud statutes. The witness was allowed to testify that amounts were deposited in his brokerage account unknown to him and endorsed with his purported signature. The defendants moved to have the testimony stricken because it imputed larceny and forgery. The testimony was held admissible for showing how illicit payments were concealed and was, therefore, "relevant to show the plan or device for carrying out the crime charged."

Applying cases under this exception presents the problem of the Court's evaluation of the scope of the scheme. Weinstein suggests the following:

> "In light of the policy of the rule to protect the defendant against unnecessary evidence, any balancing requires narrowing the scope of the provable scheme so it is no broader than is clearly required to give the trier an understanding of the evidence necessary to prove the crime charged." Weinstein's Evidence, United States Rules §404(09).

The facts of the instant case certainly do not fall within this exception. Certainly the proof submitted dealing directly with the crimes charged gave the jury "an understanding of the evidence necessary to prove the crime charged." To admit further evidence of illegal money recieved at a different time, e.g. a year apart, would clearly be prejudicial.

(3) Unique plan or scheme or pattern.

McCormick states that evidence may be admitted:

> "To prove other like crimes by the accused so nearly identical in method as to ear-mark them as the

handiwork of the accused. Here much more is demanded than the more repeated commission of the crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature." McCormick Evidence §157.

In the instant case, there are no allegations of similar acts which are "unusual and distinctive as to be a signature."

Wigmore has stated that where the issue is whether the defendant committed the act at all, and the design or plan is to be proven by similar acts, the similar acts must prove a pre-existing design, system, plan or scheme which is directed towards the doing of the crime charged as a part of its consummation. 2 Wigmore Evidence, §304 (Third Edition, 1940).

In United States v. Bussey, 432 F.2d 1330 (D.C. Cir., 1970), the Court held that in a robbery case, wherein evidence of a prior robbery was introduced by a witness who claimed the defendant robbed him on another occasion from that charged in the indictment, the Court held it was error to receive such information where the conduct of the robber was not "so unusual and distinctive as to be like a signature." Hence, in the instant case, the proffered evidence of similar acts does not fall within any exception which would allow such evidence. Hence, it should be disallowed.

Another important aspect of this case is that the evidence of the prior similar act came from one of the same witnesses who testified as to an act charged in the indictment.

In United States v. Byrd, 352 F.2d 570, 575 (Second Cir., 1965), the Court held that evidence or prior crimes from the same

witness who testified as to the crime charged in the indictment given for the purpose of proving knowledge and intent, was largely cumulative and should not have been received. The Court stated:

> "From the quality of proof standpoint for proving knowledge and intent, its probative value was largely cumulative. The evidence came from the mouth of the same witness, Kaufman, who testified to the occurrences in the first two counts. If the jury believed his testimony as to those counts, the relating of the... incident added little, if anything, to a revelation of Byrd's state of mind. If they had disbelieved Kaufman's testimony about the first two counts, it is not very likely they would have believed his story about the Sandberg tax audit."

In this case, the evidence of a prior similar act illicited from the witness, Daren, was cumulative. If the jury believed him with respect to the act charged, the evidence of the similar act was largely cumulative and, therefore, should not have been allowed in evidence.

2. NOT SUFFICIENT TIME TO INVESTIGATE THE INCIDENT AND PREPARE A DEFENSE.

The defense was not notified of the prosecutor's intention to offer evidence of a prior similar act of misconduct until the morning of trial, a Thursday. The evidence was offered the following Monday, four days later. This was insufficient time for the defendant-appellant to investigate the incident and prepare for cross-examination or for the possible introduction of defense witnesses. In a similar situation, it was held to be reversible error where defendant's counsel was not notified or furnished the results of a mental examination of the defendant until the day of trial. It was held that there was insufficient time for the defendant to prepare a possible insanity defense. United States v. Henry, 528 F.2d 661 (D.C. Cir., 1976).

3. INSTRUCTIONS AS TO SIMILAR ACTS WERE TOO BRIEF AND VAGUE TO BE UNDERSTOOD BY THE JURY.

The instructions given to the jury by the Trial Court were vague and confusing. The jury was told that they could consider evidence of the prior similar act of misconduct in several ways, e.g. identity, intent, plan, mistake, etc. These seem to be all or most of the instances in which the courts have allowed evidence of a prior similar act. In this case, however, it is obvious that most, if not all, of these factors were not in issue. If one or more of these instances was in issue, it was the responsibility of the Trial Court to carefully explain the issue to the jury. This was not done. Therefore, despite a statement by the Trial Court that they should not consider the evidence of the defendant's bad character, the jury was not furnished with any other clear alternative.

4. SUMMATION OF PROSECUTOR WAS INFLAMMATORY AND PREJUDICIAL.

In his summation, the prosecutor wrongfully departed from the issues of the case in an inflammatory manner. He stated, as follows:

> "I'd like to talk for a few moments about an aspect of this case which I think you should bear in mind when you deliberate and discuss this among yourselves. This case isn't only about the defendant. This case is also about the public, about you and I, the people in this courtroom and elsewhere. We all cannot be inspectors, whether its government inspectors, fire inspectors and meat inspectors. We have to trust the people to do that for us because it's important work. So we let people apply for that job. And we give them that job, we give them that badge of office. We give them that power in their hands. We given them that power in their hands to follow We give them our hope, our trust, our confidence that they will go out there and not only perform efficiently, but honestly. (App. p. 20a)
>
> ...You must decide whether you will condone that kind. You are the public after all. What you say here will matter, whether you will approve this kind of conduct, whether it sits well with you, whether you are satisfied with that; or whether or not you will say, any Federal employee from the highest to the lowest to whom I have entrusted responsibility is accountable to me as a member of the public not to betray me, not to betray that trust... It would be, I submit, a very sad day if all we could do was just hope and trust for the best and never hold anyone accountable. Because then we are at the mercy of the people that we have sent out there to work for us... (App. p. 21a)"

In United States v. D'Anna, 450 F.2d 1201 (Second Cir., 1971), it was stated that a prosecutor should not be permitted to indulge in oratorical flights that seriously endanger a defendant's right to a fair trial.

This sentiment was echoed in United States v. Barbone,

283 F.2d 682 (First Cir., 1960), cert. dism. 365 U.S. 805, where it was stated that a defendant is to be jealously protected against inflammable statements and prejudicial statements not based upon the evidence or fair and reasonable deductions from it. In Wakaksan v. United States, 367 F.2d 639 (C.A.N.D., 1966), cert. den. 386 U.S. 994, it was stated that arguments of counsel must be confined to the issues of the case, the applicable law, pertinent evidence and such legitimate inferences as may be properly drawn therefrom.

In the recent case of Malley v. Connecticut, 414 F.Supp. 1115 (D. Conn., 1976) it was held that the effect of a statement made by the prosecutor during a State held trial for the sale and possession of LSD that the State had in some way sacrificed the utility of two undercover agents, as a result of which agents had been "lost" to the fight against "the drug scene" could only have operated to further prejudice the jury against the defendant.

The instant case is similar to Malley v. Connecticut. The statements made by the prosecutor had nothing to do with the issues of the case. They were oratorical flights away from the evidence designed to seriously prejudice the defendant-appellant. Pasquale Maddalena.

CONCLUSION

WHEREFORE, Pasquale Maddalena urges the Court to reverse the judgment of conviction.

Respectfully submitted,

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BRIGID E. WHELAN, being duly sworn, deposes and says:

Deponent is not a party to the action; is over 18 years of age; resides at Woodside, New York.

On February 28th of 1977, deponent served the within Brief for Appellant and Appendix for Appellant upon the United States Attorney of the Eastern District of New York, attorneys for the United States of America in this action, at 225 Cadman Plaza East, Brooklyn, New York, 11201, the address designated by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the United States Postal Service within the State of New York.

Brigid E. Whelan
Brigid E. Whelan

Sworn to before me, this
28th day of February, 1977.

Mansukhlal A. Koya

MANSUKHLAL A. KOYA
Notary Public, State of New York
No. 41-4524816
Qualified in Queens County
Commission Expires March 30, 1978